FILED
MAY 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1498

In the Supreme Court of the United States

OCTOBER TERM, 1979

VEN-FUEL, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN P. MCKENNA
ARTHUR S. WEISSBRODT
Attorneys
Department of Energy
Washington, D.C. 20461

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	11

CITATIONS

Cases:

Bray v. *United States*, 423 U.S. 73	5
City of Groton v. *FPC*, 487 F.2d 927	9
Coastal States Marketing, Inc. v. *New England Petroleum Corporation*, 604 F.2d 179	7
Oklahoma Association of Energy Consumers and Producers v. *FEA*, No. 79-1847 (10th Cir. Oct. 23, 1979)	6
Quincy Oil, Inc. v. *FEA*, No. 1-5 (TECA Apr. 24, 1980)	9
Spinetti v. *Atlantic Richfield Co.*, 552 F.2d 1401	9
Structural Steel and Ornamental Iron Association of New Jersey, Inc. v. *Shopmen's Local Union No. 545*, 478 F.2d 848	8
Texaco, Inc. v. *Department of Energy*, No. D.C.-52 (TECA Oct. 15, 1979)	7, 9
United States v. *Wickland*, No. 9-45 (TECA Apr. 18, 1980)	11

Statutes and regulations: Page

Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq.* 2

Section 5, 15 U.S.C. 754 2

Section 5(a)(1), 15 U.S.C. 754(a)(1) 2, 3

Economic Stabilization Act of 1970, 12 U.S.C. 1904 note 2

Section 211(b)(1) 6

Section 211(b)(2) 3, 4, 5, 7

Section 211(c) 5

Section 211(d)(2) 5

Department of Energy Organization Act, Section 504(b)(1), 12 U.S.C. 7194(b)(1) 8

6 C.F.R. 150.359 3

10 C.F.R. 212.93 3

Miscellaneous:

S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971) 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1498

VEN-FUEL, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1) and the district court (Pet. App. 5-6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. A petition for rehearing was

denied on December 28, 1979 (Pet. App. 2). The petition for a writ of certiorari was filed on March 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals over "all appeals from the district courts of the United States in cases and controversies arising under" the Emergency Petroleum Allocation Act extends to an appeal from a judgment of the district court dismissing an EPAA claim for failure to exhaust administrative remedies.

STATUTES INVOLVED

The pertinent provisions of 15 U.S.C. 754(a)(1) and 12 U.S.C. 1904 note are set forth at Pet. 3.

STATEMENT

Petitioner Ven-Fuel, Inc., commenced this suit in the United States District Court for the Southern District of Florida to enjoin the Department of Energy from continuing with an administrative proceeding against petitioner to enforce the price control limitations of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 751 *et seq.* In initiating the administrative proceeding, DOE alleged that petitioner had charged an excessive price for fuel oil sold to the Jacksonville, Florida, Electric Authority.[1]

[1] 15 U.S.C. 754 confers authority upon DOE to enforce the price control provisions of the EPAA. Pursuant to that authority, the agency issued regulations establishing an administrative enforcement mechanism which, as here, is triggered by the issuance of a "Notice of Probable Violation" of the Act. See 6 C.F.R. 150.359; 10 C.F.R. 212.93.

Petitioner asserted in its district court complaint that the price dispute had previously been settled among all parties and that the enforcement proceeding was accordingly improper (Pet. App. 7-26).

The district court granted DOE's motion to dismiss the complaint on the ground that petitioner had failed to exhaust its administrative remedies (Pet. App. 5-6). When petitioner appealed that order to the United States Court of Appeals for the Fifth Circuit, DOE moved to dismiss the appeal on the ground that the case "arose under" the EPAA and thus that, under Section 211(b)(2) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note,[2] the Temporary Emergency Court of Appeals ("TECA") has exclusive jurisdiction over "all appeals" in such cases (Pet. App. 3-4). The court of appeals granted the motion to dismiss the appeal (Pet. App. 1).

ARGUMENT

1. Petitioner argues that TECA's jurisdiction is strictly limited to "issues" that involve the validity, interpretation, or application of the EPAA, or regulations or orders promulgated thereunder. More

[2] Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), expressly incorporates the judicial review provision found in Section 211(b)(2) of the ESA. Accordingly, where appropriate, the statutes hereinafter will be referred to collectively as the "EPAA."

specifically, petitioner contends that TECA lacks the power to resolve threshold issues of general law, such as exhaustion of administrative remedies, that may be involved in the disposition of an EPAA claim. Such questions, says petitioner, are not EPAA "issues" within TECA's jurisdiction, but are instead within the exclusive jurisdiction of the eleven circuit courts of appeals.[3] In other words, petitioner would bifurcate appeals of orders disposing of an EPAA claim on both EPAA and non-EPAA grounds, with the EPAA ground going to TECA and the non-EPAA ground going to the circuit courts.

The decision of the court of appeals is correct and does not warrant review by this Court. Petitioner's proposed jurisdictional approach is inconsistent with the plain language of Section 211(b)(2) of the ESA and with the policy of judicial economy and expedition that Congress intended to promote in granting appellate jurisdiction to TECA. Section 211

[3] Petitioner asserts (Pet. 6) that its claim in the district court did not "arise under" the EPAA or the regulations issued thereunder because the complaint "did not challenge or dispute any EPAA rule, regulation, order, or administrative finding * * *." However, petitioner has not presented this as a question for review, and the construction of this specific complaint clearly is of no general importance. In any event, it is readily apparent that the complaint asserted a claim based directly upon the EPAA and the implementing regulations (Pet. App. 20-23). Indeed, had the claim not "arisen under" the EPAA, dismissal for lack of jurisdiction would have been compelled because the complaint did not allege any other basis of subject matter jurisdiction.

Petitioner also argues (Pet. 6-8) that the district court's decision on the exhaustion issue is incorrect. We disagree, but the point is irrelevant to the narrow jurisdictional issue presented in the petition.

(b)(2) unequivocally provides that, in cases "arising under" the Act, TECA has appellate jurisdiction over "all appeals," not merely those raising "pure" EPAA issues:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of *all appeals* from the district courts of the United States *in cases and controveries arising under this title or under regulations or orders issued thereunder.* (Emphasis supplied)

As this Court has emphasized, the provision was designed "to provide speedy resolution of cases brought under the [Emergency Petroleum Allocation] Act and 'to funnel into one court [TECA] all the appeals arising out of the District Courts and thus gain in consistency of decision.'" *Bray* v. *United States*, 423 U.S. 73, 74 (1975), quoting from S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971).

Other sections of the statute confirm the plain meaning of the jurisdictional provision. Thus, Section 211(c) of the ESA provides that, upon the mandatory certification of "a substantial constitutional issue," TECA may determine "that the entire action be sent to it for consideration * * *." This subsection recognizes that TECA's jurisdiction extends over "the entire action," including questions of constitutional magnitude, not merely issues involving the construction and application of the EPAA. Similarly, Section 211(d)(2) of the ESA provides for exclusive appellate jurisdiction in TECA over certified district court

decisions granting or denying preliminary injunctions, even though such appeals frequently will turn on general issues such as irreparable injury or ripeness.[4]

There also are several practical problems with petitioner's suggested approach. Mandating split appeals on a single claim hardly promotes judicial economy and expedition. As the Tenth Circuit recently noted regarding such bifurcated appeals, "[t]here is little to be gained, * * * other than mass confusion, by the promoting of simultaneous circuit court-TECA appeals." *Oklahoma Association of Energy Consumers and Producers* v. *FEA*, No. 79-1847 (Oct. 23, 1979) slip op. 5. It would, in fact, complicate and significantly lengthen appeals in EPAA cases, contrary to the congressional objective of expedition, because EPAA claims normally will involve both "pure" EPAA issues and procedural issues that turn on general legal principles not peculiar to EPAA claims. In addition, petitioner's approach would require the courts, before taking jurisdiction over an appeal, to make a preliminary assessment of whether or not the issues raised were "pure" EPAA issues. However, as even petitioner recognizes (Pet. 10), "[j]urisdiction

[4] See also Section 211(b)(1) of the ESA, which provides that TECA "shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title." While this subsection does not directly address the scope of TECA's jurisdiction, its language militates strongly against any attempt to draw distinctions between TECA's appellate powers and those of a circuit court of appeals.

should not be based upon case-by-case or issue-by-issue analysis."

2. Petitioner contends (Pet. 5) that the decision below conflicts with the Second Circuit's decision in *Coastal States Marketing, Inc.* v. *New England Petroleum Corporation*, 604 F.2d 179 (1979), and TECA's decision in *Texaco, Inc.* v. *Department of Energy*, No. D.C.-52 (Oct. 15, 1979). This contention is insubstantial.

In *Coastal States*, unlike the present case, the district court's original jurisdiction was not based upon a claim that "arose under" the EPAA. Rather, the EPAA issue was presented by way of defense and counterclaim to the plaintiff's breach of contract action. The district court rejected the EPAA-related defense and granted judgment for the plaintiff. The Second Circuit, in dismissing the appeal, held that the phrase " 'cases and controversies arising under' the [EPAA], as used in § 211(b)(2), means adjudications by a district court of an '[EPAA] issue' " (604 F.2d at 187), even where the issue has been presented by way of defense or counterclaim. The court of appeals noted however, that TECA should not be burdened where one of the parties seeks relief on both EPAA and non EPAA grounds, but judgment is entered only on the non-EPAA ground. "What is determinative," said the court, "is not the existence of an [EPAA] issue, but whether the [EPAA] issue has been adjudicated." *Ibid.* (footnote omitted). Here, petitioner's sole claim for relief was based on an asserted violation of the EPAA and its imple-

menting regulations (see note 3, *supra*). The district court adjudicated that claim in holding that petitioner had not exhausted its administrative remedies. Hence, *Coastal States* does not conflict with the decision below.[5]

Texaco is no more helpful to petitioner. There, the Federal Energy Regulatory Commission had dismissed an appeal from an EPAA-related order issued by DOE's Office of Hearings and Appeals on the ground that FERC had no jurisdiction to review the challenged order under the terms of its jurisdictional statute, Section 504(b)(1) of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. II) 7194(b)(1). When plaintiffs subsequently challenged the order in the district court, one of the plaintiffs claimed that, under the DOEOA, FERC's disavowal of jurisdiction was improper. The district court, without addressing the EPAA claims, held that FERC had jurisdiction under the DOEOA and remanded the proceeding to FERC. On appeal, the only issue was the propriety of FERC's refusal to review DOE's order, a question of statutory construction solely involving the DOEOA. TECA dismissed the appeal, concluding that the mere fortuity that the separate complaint under the DOEOA was presented with other claims arising under the EPAA

[5] *Structural Steel and Ornamental Iron Association of New Jersey, Inc.* v. *Shopmen's Local Union No. 545*, 478 F.2d 848 (3d Cir. 1973), cited by petitioner (Pet. 8), is also not inconsistent with the instant case. There, the claim asserted in the district court arose under the Arbitration Act, not EPAA, and no EPAA issue was raised on appeal.

was insufficient to confer jurisdiction over the DOEOA claim.

Since FERC's jurisdiction under the DOEOA was a matter wholly separate from and not merely a facet of the EPAA claims, *Texaco* is consistent with *Coastal States* and with a number of prior TECA decisions refusing to assert jurisdiction over claims arising under other federal laws merely because they are joined with claims arising under the EPAA.[6] By contrast, exhaustion of administrative remedies is not an independent claim or cause of action; it is a procedural defense that may be asserted in the course of adjudicating a claim or a cause of action, including causes of action arising under the EPAA, and the defense is inextricably related to the cause of action itself.[7]

TECA recently dispelled any possible confusion that might have resulted from its decision in *Texaco*. In *Quincy Oil, Inc.* v. *FEA*, No. 1-5 (TECA Apr. 24, 1980), the sole issue raised on appeal was whether plaintiffs' challenge to an administrative ruling interpreting certain regulations became moot when DOE revoked the challenged ruling and issued a new ruling adopting the position espoused by plaintiffs.

[6] See, *e.g.*, *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975); *City of Groton* v. *FPC*, 487 F.2d 927 (TECA 1973).

[7] TECA's conclusion in *Texaco* that it has jurisdiction only over issues *or* claims arising under the EPAA (slip op. 10) may refer to the possibility that TECA's appellate jurisdiction extends, as *Coastal States* held, to cases where EPAA "issues" arise during the litigation of non-EPAA claims.

Relying, as does petitioner, upon *Coastal States* and *Texaco*, plaintiffs argued that TECA had no jurisdiction over the appeal because "mootness" was a question of general or constitutional law rather than an EPAA issue. TECA, however, sustained its jurisdiction because the substantive claim or cause of action "arose under" the EPAA (slip op. 7-8):

> Mootness, however, is not an "issue" that arises independently of the substantive claim or cause of action being challenged as moot. Rather, the doctrine of mootness questions the continuing vitality of a substantive claim or cause of action under adjudication and has no life apart from that substantive claim.
>
> Furthermore, to apply the term "issue" as it is used in *Texaco* and *Coastal States* to mootness—and by logical extension to other subsidiary, procedural and threshold questions such as standing, ripeness and venue—would remove those questions from this court's jurisdiction and thus prevent it from performing the normal and necessary functions of any appellate court. We have consistently exercised jurisdiction over such matters. *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (TECA 1977) (procedure); *Mosler* v. *Nationwide Purchasing Inc.*, 485 F.2d 418 (TECA 1973) (venue); *Standard Oil Co.* v. *DOE*, 596 F.2d 1029 (TECA 1978) (ripeness); *City of New York* v. *New York Telephone Company*, 468 F.2d 1401 (TECA 1972) (exhaustion of administrative remedies).

The final example cited in the quoted passage, "exhaustion of administrative remedies," is the very point at issue here.[8] Hence, petitioner is plainly incorrect in asserting (Pet. 9) that TECA "would have been obligated to dismiss [its] appeal for lack of jurisdiction," and the court of appeals therefore properly deferred to TECA's exclusive jurisdiction under the EPAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN P. MCKENNA
ARTHUR S. WEISSBRODT
Attorneys
Department of Energy

MAY 1980

---

[8] In another recent case, TECA sustained its jurisdiction where the claim in the district court "arose under" the EPAA, but the only issue raised on appeal—an estoppel defense—was a "general question of administrative law." *United States* v. *Wickland*, No. 9-45 (Apr. 18, 1980).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320239 311